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KERAJAAN MALAYSIA & ORS v. NORFAZLIN ZAMANI

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
MOHAMED ZAINI MAZLAN JCA
AZMI ARIFFIN JCA

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[CIVIL APPEAL NO: B-01(NCVC)(W)-556-08-2022]
25 SEPTEMBER 2024

C

Abstract – *An appellate court should not exercise appellate interference towards a trial judge's assessment of quantum of damages unless it could be shown that the trial judge had either erred in principle in assessing the quantum of damages or he/she had made a wholly erroneous estimate of the damages suffered by the claimant.*

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CIVIL PROCEDURE: *Appeal – Appeal against judgment of High Court – High Court awarded patient of public hospital with general and aggravated damages and global sum for getting up costs and out-of-pocket expenses – Action for damages commenced by patient of public hospital after sustaining physical and psychiatric injuries due to negligent act of medical officer – Whether appellate intervention necessary – Whether trial judge erred in principle or made wholly erroneous estimate of damages suffered by patient of public hospital*

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The appellants ('defendants') were the Government of Malaysia ('first defendant') and the medical doctors ('second to 20th defendants') who had attended to the respondent ('plaintiff') at the time she was undergoing delivery at the Selayang Hospital ('hospital'). The plaintiff was an aesthetician who ran her own clinic and, hence, had a very busy career. For that reason, the plaintiff decided to undergo the vaginal birth method as such method would allow her a speedy post-partum recovery, so that she could resume her work quickly. The plaintiff then subscribed to the full paying patient scheme ('FPP scheme') offered by the hospital. Among the advantages of the said scheme was that the plaintiff was allowed to choose her own consultant who would attend to her ante natal care and delivery. The plaintiff chose one 'Dr Valyakalayil Daniel Philip' ('20th defendant'), the hospital's Head of the Obstetrics and Gynaecology Department. On the date of the delivery, as the plaintiff's baby showed signs of foetal distress, she was required to undergo an emergency caesarean section. However, much to the plaintiff's consternation, the 20th defendant was not available at that time. Therefore, the said operation was taken over by a young medical officer with only two-year experience, one Dr Khor ('second defendant'). Thereafter, although a healthy baby girl was born, the second defendant also negligently caused lacerations towards the plaintiff's bladder ('negligent act'). Several predicaments were then faced by the plaintiff. Firstly, after the said

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operation, the plaintiff was noted to have haematuria (blood-stained urine), which was a clear sign of a bladder injury. However, none of the second to 20th defendants decided to conduct further investigations regarding the matter. The bladder injury was only discovered two days later. A laparotomy was conducted upon the plaintiff, where 1.3 litres of contaminated flued/urine was found in her peritoneal cavity, which had to be sucked out and cleaned with saline solution as the same could cause inflammatory reaction to the peritoneum tissues. Secondly, eight days after the delivery, during a bedside procedure to remove a portex drain from the plaintiff, a 14cm portion of the said drain accidentally snapped leaving the said portion retained inside the plaintiff's abdomen. This caused a relaparotomy to be conducted upon the plaintiff. Thirdly, the plaintiff's period of convalescence for her physical injuries was prolonged until three months. During that period, the plaintiff could not go to her clinic at all. Fourthly, the pain and suffering that the plaintiff had to endure had manifested mental strain upon her. However, no psychiatric assistance was offered by the defendants. In fact, during and after the plaintiff's subsequent pregnancy, she had (i) entertained the thought of aborting the pregnancy; (ii) considered throwing her baby out of the window; (iii) undergone bilateral salpingectomy surgery to remove her fallopian tubes to avoid further pregnancies. After the plaintiff recovered from her psychiatric injuries, she commenced an action for medical negligence against the defendants at the High Court, claiming for general, special and aggravated damages ('action'). As the action had been withdrawn against the second to 20th defendants, and the first defendant had conceded liability, the High Court proceeded to decide on the quantum of damages to be awarded to the plaintiff. The plaintiff was awarded with, among others: (i) general damages in the sum of RM260,000; (ii) aggravated damages in the sum of RM150,000; and (iii) a global sum of RM150,000 being getting up costs and out-of-pocket expenses. Hence, the present appeal by the defendants against the quantum of damages awarded by the High Court.

Held (allowing appeal in part)
Per Azmi Ariffin JCA delivering the judgment of the court:

(1) On pain and suffering, it was found that due to the negligent act, including the physical injuries to the plaintiff's bladder, the plaintiff had to undergo three surgeries. As such, the amount of RM260,000 for general damages, as awarded by the High Court, was affirmed. (para 36)

(2) On aggravated damages, the bad conduct was attributed to the delay in dealing with the plaintiff's complaints and delay in admitting liability. There was a delay of two days in dealing with the plaintiff's complaints. Whereas in respect of the delay in admitting liability, the admission was only made by the first defendant some 17 months after the trial of the

action had started. Considering that in the instant case it could not be said that there was an exceptional and contumelious conduct in committing the negligent act because there was no physical injury to the plaintiff as per the case of *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* and the instant case was dealing with a public hospital catering to the public needs and interests, the appeal was allowed in part. The award of RM150,000 for aggravated damages by the High Court was therefore set aside. Instead, for aggravated damages, the plaintiff was awarded with the amount of RM80,000. (paras 32, 39 & 40)

(3) On the issue of getting up costs and out-of-pocket expenses, the court was urged to take into consideration that the case only proceeded on the issue of damages since liability was admitted by the first defendant. The days of the trial had been shortened and the plaintiff was only required to call three witnesses. As the trial on liability had started and the plaintiff's solicitors had procured all the relevant expert witness, the High Court's award of global sum of RM150,000 for the getting up costs and out-of-pocket expenses was affirmed. Other than that, the plaintiff was also awarded with costs of RM15,000 subject to the allocatur fees. (paras 41, 42 & 44)

Case(s) referred to:

Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 3 CLJ 427 FC ***(refd)***

Hasniyati Hassan & Anor v. Kerajaan Malaysia [2022] 7 CLJ 565 HC ***(refd)***

Lee Bang v. Nadzri [1965] CLJU 82; [1965] 1 LNS 82 HC ***(refd)***

Sheela Christina Nair v. Regency Specialist Hospital Sdn Bhd & Ors [2016] 9 CLJ 267 HC ***(refd)***

Tan Cheong Poh & Anor v. Teow Ah Keow [1996] 3 CLJ 665 CA ***(refd)***

For the appellant - Noerazlim Saidil & Natrah Mazman; SFCs

For the respondents - Karthi Kanthabalan & Aaika Zulaika Mohd Yusop; M/s PS Ranjan & Co

[Editor's note: For the High Court judgment, please see Norfazlin Zamani v. Kerajaan Malaysia & Ors [2023] 7 CLJ 294 (overruled in part).]

Reported by Syamim Ariffin

JUDGMENT

Azmi Ariffin JCA:

Introduction

[1] This is a medical negligence action filed by the plaintiff against the Government of Malaysia, who is named as the first appellant/first defendant in this suit. The plaintiff suffered serious bladder and abdominal injuries following a caesarean section delivery, which necessitated further remedial surgeries. She also suffered serious psychiatric injuries as a result.

[2] The first appellant/first defendant admitted liability some three years later on 11 February 2022 with damages and costs to be assessed. With that, the parties recorded a consent judgment and the claim against the second to 20th defendants was withdrawn with no order as to costs. The trial proceeded only on the issue of quantum (assessment of damages and costs).

[3] On 1 July 2022, the learned High Court Judge awarded the plaintiff the sum of RM492,392 as damages and the sum of RM150,000 as costs.

[4] The breakdown of the figures is reproduced herein:

Maka Dengan Ini Dihakimi bahawa gantirugi dan kos dibayar oleh Defendan Pertama kepada Plaintif seperti berikut:-

		RM	RM
A	**Gantirugi Khas**		
1.	Perbelanjaan hospital dan perubatan	3,640.00	
2.	Perbelanjaan perjalanan dan perbelanjaan sampingan	1,254.00	
3.	Nilai penjagaan oleh ahli keluarga	2,500.00	
4.	Kos mendapatkan perintah untuk penzahiran rekod perubatan	tiada awad	
5.	Kehilangan pendapatan (RM5,000 x 3 bulan)	15,000.00	
	Sub-jumlah		22,394.00
B	**Ganti rugi Am**		
6.	kesakitan dan penderitaan dan kehilangan ameniti hidup		260,000.00
7.	gantirugi teruk		150,000.00
	sub-jumlah		410,000.00
C	**Gantirugi Am Masa Hadapan**		
8.	kos pembedahan		
9.	kesakitan dan penderitaan untuk masa hadapan dan kehilangan ameniti hidup		60,000.00
	Jumlah:		**492,394.00**
D	**Kos**		
10.	yuran penyediaan untuk prosiding-prosiding liabiliti dan kuantum dan perbelanjaan hangus		150,000.00

E Faedah

11. Faedah ke atas gantirugi khas pada kadar 4% setahun dari 28 Ogos 2016 hingga tarikh penghakiman liabiliti 1 Julai 2022;

12. Faedah ke atas gantirugi pra-bicara, gantirugi am untuk kesakitan dan penderitaan dan kehilangan ameniti hidup dan gantirugi teruk pada kadar 8% setahun dari tarikh penyampaian writ, 1 Oktober 2019 hingga tarikh penghakiman liabiliti, 1 Julai 2022; dan

13. Faedah ke atas jumlah penghakiman, termasuk kos pada kadar 5% setahun dari tarikh penghakiman liabiliti 1 Julai 2022 hingga tarikh pembayaran penuh. (emphasis added)

[5] Despite the withdrawal of the action, the second to 20th defendants have also appealed against the whole of the decision on quantum.

[6] The defendants have appealed against the whole decision on quantum, but the memorandum of appeal only addresses on three items, namely:

(i) general damages for pain and suffering and loss of amenities of life in the sum of RM260,000;

(ii) aggravated damages in the sum of RM150,000; and

(iii) costs in the sum of RM150,000.

[7] Hence, the appeal before us is only on quantum.

[8] For ease of reference, parties will be referred to as plaintiff and defendants as they were in the High Court.

Chronology Of Events

[9] We shall now briefly lay out the background facts leading to the filing of the claim.

[10] The plaintiff, who is a medical doctor, underwent an emergency caesarean section at the Selayang Hospital on 28 August 2016. It was supposed to be an uneventful and happy occasion. Sadly, on account of the admitted negligence of the attending doctor, the plaintiff suffered serious bladder injuries. This eventually led to psychiatric issues as a result of the bodily harm caused to the plaintiff.

[11] The plaintiff, who is a medical doctor, was 32 years old and in her second pregnancy at the time of the incident. She had delivered her first baby seven years previously by way of a caesarean section at the Gleneagles Hospital Kuala Lumpur, without any complications.

[12] She was self-employed. She ran an aesthetic clinic together with her husband, who worked as a clinic manager. She was the sole doctor in her practice.

[13] She had chosen to have a normal delivery for the second delivery in order for her to have a speedy post-partum recovery so that she could return to work as soon as possible. This was all due to her busy career.

[14] She was therefore keen on a vaginal birth as this method of delivery will allow her to recover quickly. The plaintiff made inquiries and opted to signed up for the full paying patient scheme ("the FPP scheme") at the Selayang Hospital under the care of Dr Valyakalayil Daniel Philip, who was the Head of the Department of Obstetrics and Gynaecology.

[15] The FPP scheme allowed patient to choose a consultant of their choice for antenatal care and to eventually undertake the delivery of their babies. The plaintiff had chosen Dr Valyakalayil Daniel Philip and was made to believe that he will attend to her delivery. The plaintiff felt reassured that she was in good hands.

[16] The plaintiff had presented herself at the hospital with labour contractions in the early hours of Sunday, 28 August 2016. Her baby had shown signs of foetal distress. A decision was made at 8.36am on the same day to perform an emergency caesarean section in order to save the lives of both mother and baby.

[17] Much to her consternation, she was told that Dr Valyakalayil Daniel Philip was not available on weekends and that Dr Khor Xin Yun, a young medical officer (second defendant) of two years of experience, would be on hand to undertake the caesarean operation. The plaintiff felt she did not have any choice but to consent to it.

[18] The operation was carried out and the plaintiff gave birth to a healthy baby girl. Unfortunately, during the operation, Dr Khor Xin Yun negligently caused lacerations to the plaintiff's bladder.

[19] In the immediate post-operative period, the plaintiff was noted to have haematuria (blood-stained urine), which was an obvious sign of bladder injury. However, none of the medical officers and healthcare givers who attended to the plaintiff thereafter noted this sign as serious enough to call for further investigations.

[20] Her bladder injury was finally detected on 30 August 2016. A laparotomy had to be carried out the next day (31 August 2016), during which 1.3 litres of contaminated fluid was found in her peritoneal cavity. The iatrogenic perforation of the bladder had led to the urine leaking into the peritoneal cavity over a period of two days before it was detected, which, had to be sucked out and cleaned with saline solution. This contaminated urine caused an inflammatory reaction to the tissues of the peritoneum.

[21] On 8 September 2016 (eight days later) during a bedside procedure to remove the portex drain undertaken by medical officers, the portex drain snapped, leaving a 14-centimetre portion of the drain retained inside the plaintiff's abdomen. The plaintiff had to undergo a relaparotomy on the same day for the removal of the retained portion of the portex drain. This was her third operation.

[22] The mental strain of her pain and suffering manifested itself soon after. She was also not offered any psychiatric assistance despite being clearly depressed and anxious whilst she was in the hospital suffering from the complications. Being unable to be with and to care for her newborn baby during that precious early post-delivery stage added further to her anguish.

[23] Her recovery was stormy. Her injuries had caused her a great deal of pain and turmoil and she required about three months of convalescence during which she was unable to work. The agony she underwent was so severe that she said she wanted to die if that could stop her pain and the mental anguish she was experiencing. She could not go to her clinic and work during that period.

[24] The medical condition she experienced this time around was very much in contrast to her first delivery in 2010, when she was discharged from the hospital one day after her delivery and she was back to work two weeks later.

[25] Her troubles did not end with the prolonged suffering from the complications. She became pregnant unexpectedly for the third time in 2018. It was a stressful pregnancy for her and she developed severe antenatal anxiety disorder during the pregnancy. She blamed it on her previous bitter experience during the birth of her second baby at the Selayang Hospital in 2016.

[26] The traumatic experience affected her gravely this time around. It gradually worsened to such an extent that she wanted to abort the pregnancy despite knowing the medical risks and moral consequences. She also wanted to throw her baby out of the window, and she wanted to surgically remove her fallopian tubes to avoid getting pregnant again.

[27] She had to be persuaded by her obstetrician, Dr Maherah binti Kamaruddin (PW3), to continue with the pregnancy. PW3, who was her attending physician said that it was not easy to convince the plaintiff to change her mind. During this period, the plaintiff had also consulted a psychiatrist one Dr Jannah at the University of Malaya Medical Centre.

[28] Following psychiatric treatment and counselling, the doctors managed to stop the plaintiff from terminating the pregnancy or causing harm to her baby. Unfortunately, the doctors were not able to dissuade her from

undergoing a bilateral salpingectomy (removal of both the fallopian tubes) to avoid from getting pregnant again and repetition of the trauma that she had suffered.

[29] Her intention to undergo a salpingectomy was met with initial resistance from the medical personnel attending to her. She was counselled and advised to reconsider her decision as she was too young to take such a drastic measure. Despite such advice, she went ahead and underwent the surgical procedure. Fortunately, she has now made good recovery from her psychiatric injuries and no longer requires treatment.

[30] The plaintiff filed this claim on 28 August 2017 against the first defendant and 19 of its doctors who had attended to the plaintiff during her stay in the hospital.

Admission Of Liability

[31] On 28 September 2020, learned counsel for the defendant formally wrote to the court to inform that the defendant intended to concede on liability.

[32] Liability was only admitted some 17 months later on 11 February 2022, well after the trial had commenced and after the plaintiff's expert witness, consultant obstetrician and gynaecologist, Dr Thaneemalai Jeganathan (PW1), had completed giving his evidence. On the same day, the plaintiff withdrew her claim against the second to 20th defendants and the claim against them was struck out.

The Trial

[33] On the issue of quantum, the plaintiff called two following witnesses to give evidence:

(i) Dr Thaneemalai Jeeganathan (PW1), the consultant obstetrician and gynaecologist from Thomson Hospital, Kuala Lumpur; and

(ii) Dr Maherah Kamaruddin (PW2), a senior clinical lecturer on Obstetrics and Gynaecology.

[34] The defendant did not call any witnesses.

The Law On Appellate Intervention

[35] An appellate court will not interfere in the trial judge's exercise in an appeal on damages unless it is satisfied that the judge had erred in principle or had made a wholly erroneous estimate of the damage suffered. This principle was reiterated by the Court of Appeal in *Tan Cheong Poh & Anor v. Teow Ah Keow* [1996] 3 CLJ 665; [1995] 3 MLJ 89, where VC George JCA (as he then was) delivering the judgment of the court said as follows:

A The court was advised that the amount being awarded to quadraplegic plaintiffs for pain and suffering and loss of amenities had gone up to some RM180,000 and on that basis, it was submitted that the instant plaintiff should have been awarded between RM140,000 and RM150,000. While we are prepared to say that the RM100,000 awarded under this head was perhaps on the low side, we do not think that it should have been B anywhere near RM140,000. However, we also do not think that the RM100,000 was so manifestly low that this court should increase the amount. *It is trite that the appellate court should not give preference to its own figure simply because they disagree with the figure arrived at by the trial judge; it will only interfere if it is satisfied that the judge has acted on a wrong principle of law or has for other reasons made a wholly erroneous estimate of the damage suffered* – see C *Mallal's Supreme Court Practice* (2nd Ed) para 57/1113. Applying that test in the instant appeal, in our judgment this court should not interfere with the trial judge's award of RM100,000 for pain and suffering and loss of amenities. (emphasis added)

Summary Of The Learned Trial Judge Decision On Quantum

D *Pain And Suffering*

(i) the plaintiff underwent a number of procedures including a total of three operations. She was warded for 21 days at the Selayang Hospital as a result of the defendant's negligence.

E (ii) the plaintiff suffered psychiatric problems immediately after the birth of her second baby and again manifested itself during her third pregnancy some two years later.

(iii) after the delivery of her third baby, the plaintiff became severely depressed and considered throwing her baby out of the hospital F window.

(iv) the plaintiff took steps to undergo removal of her fallopian tubes to avoid getting pregnant again as she did not want to undergo the terrible pain and suffering she went through at the Selayang Hospital.

G (v) the traumatic episodes she experienced are substantiated and validated by the defendant's psychiatric expert, Dr Ummi Adzlin binti Silim, *via* her expert report dated 19 November 2020. Dr Ummi Adzlin binti Silim diagnosed the plaintiff to be suffering from a severe form of antenatal depression.

H (vi) counsel for the plaintiff proposed that the sum of RM400,000 be awarded as general damages for the pain and suffering and loss of amenities of life suffered by the plaintiff, including the psychiatric trauma she experienced.

I (vii) counsel for the defendant suggested the sum of RM50,000.

(viii) the court awarded the sum of RM260,000 after taking into consideration the physical injuries suffered such as the iatrogenic injuries to the plaintiff's bladder, haematuria, sepsis, *etc*, and the psychiatric effect on her.

Aggravated Damages

(i) the defendant admitted liability on 11 February 2022, some 17 months after the exchange of expert opinion and after PW1 had completed his expert evidence.

(ii) the lackadaisical attitude of the doctors and nurses in ignoring the plaintiff's complaints of pain and gross haematuria immediately after the caesarean surgery. The signs of blood-stained urine were missed by the medical officer and nurses.

(iii) the plaintiff had to again undergo a second laparotomy when the portex drain snapped while it was being pulled out of her body. This was due to the poor vigilance and technique in the use of the portex drain.

(iv) the plaintiff was a full fee-paying patient and she had been given to understand that she will be attended to by a specialist of her own choice. She was instead attended to by a medical officer. She was deprived of her right to be attended to by another specialist to undertake the surgery.

(v) counsel for the plaintiff suggested RM500,000.

(vi) the court awarded RM150,000 to assuage the sense of wrong and harm caused to the plaintiff by the conduct of the defendants.

Costs

(i) delay admission of liability. The plaintiff's solicitors had undertaken significant getting up on liability and quantum in preparation for a full-blown trial.

(ii) defendant counsel proposed RM5,000.

(iii) the court award a global sum combining the getting up costs of RM150,000 for the time taken up with extensive getting up on liability, causation and quantum, review of medical records, obtaining medical and expert opinions, preparing the claim to be filed, drafting and filing of the various pre-trial case management documents.

Our Decisions

[36] On pain and suffering, we find that the plaintiff had to undergo three surgeries after the negligent act, including the physical injuries to the plaintiff's bladder. As such, we affirm the sum of RM260,000 given by the learned High Court Judge.

[37] Useful reference may be made to the High Court case of *Sheela Christina Nair v. Regency Specialist Hospital Sdn Bhd & Ors* [2016] 9 CLJ 267, in which the plaintiff suffered perforation of her small intestines during a gynaecological surgery, which required several repair operations and a prolonged period of convalescence. The sum of RM240,000 was awarded as general damages for pain and suffering and the loss of amenities of life.

[38] In *Hasniyati Hassan & Anor v. Kerajaan Malaysia* [2022] 7 CLJ 565; [2022] MLJU 376, the first plaintiff had suffered loss of her reproductive organs and a temporary psychiatric injury following the negligence of the doctors who had failed to secure the uterine bleeding following her delivery. The sum of RM300,000 was awarded as general damages for pain and suffering and the loss of amenities of life.

[39] On aggravated damages, the learned High Court Judge has allowed a sum of RM150,000. Learned counsel for the plaintiff cited the Federal Court decision in *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427, in which the plaintiff suffered injuries and loss of vision on his right eye caused by the negligence of Dr Hari Krishnan and Dr Namazie as servant and agent of the hospital. The sum of RM1 million was awarded as aggravated damages.

[40] In the instant case, the bad conduct was attributed to the delay in dealing with the plaintiff's complaints and delay in admitting liability. There was a delay of two days in dealing with the complaints of the plaintiff and delay in admitting to liability. Here, we are dealing with a public hospital catering to public needs and public interests and it cannot be said that there was exceptional and contumelious conduct in committing the wrong. Added to that, there was no physical injury to the plaintiff as per *Dr Hari*'s case. As such, we allow the appeal in part and set aside the award of RM150,000. We award aggravated damages in the sum of RM80,000.

[41] On the issue of getting up fee and out-of-pocket expenses, the plaintiff claimed the getting up fee of RM200,000 and out-of-pocket expenses of RM13,175.15. On the other hand, the defendant urged the court to take into consideration that the case only proceeded on the issue of damages since liability was admitted. Thus, it shortened the days of trial and the plaintiff only had to call three witnesses. It was argued that the court should exercise its discretion and only award RM5,000 for getting up costs including out-of-pocket expenses. The learned High Court Judge decided to award a global sum of RM150,000 combining the getting up costs and out-of-pocket expenses.

[42] In our considered view, as the trial on liability has started and the plaintiff's solicitors has procured all the relevant expert witnesses, we affirm the decision of the learned High Court Judge on this head.

[43] In *Lee Bang v. Nadzri* [1965] CLJU 82; [1965] 1 LNS 82; [1965] 2 MLJ 186, Macintyre J stated that where the proceedings in an action have reached a stage when a hearing in open court is inevitable, the legal advisers of the parties are entitled to be in readiness for the hearing and must be compensated for the work done irrespective of whether there was actually a hearing in open court or not.

[44] In conclusion, we unanimously allowed the appeal in part with cost of RM15,000 to the plaintiff/respondent subject to allocatur fees.

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